Supreme Court, U.S.
F I L E D
MAY 25 1999
CLERK

NO. 98-1709

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

MAY LINDA HEYWARD,

Petitioner,

v.

MICHAEL C. MONROE, individually and in his official capacity as District Director of Health Education for the South Carolina Department of Health and Environmental Control and SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Hardwick Stuart, Jr.
Berry, Quackenbush & Stuart, PA
Post Office Box 394
Columbia, South Carolina 29202
(803) 771-4723

Attorney for Respondents

TABLE OF CONTENTS

Table of Authorities ii

Reasons for Denying the Petition 1

Conclusion 6

TABLE OF AUTHORITIES

Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997) 4, 5

Corley v. Jackson Police Department, 566 F.2d 994, 998-99 (5th Cir. 1978) 3

Friedel v. City of Madison, 832 F.2d 965 (7th Cir. 1987) 3

Garrett v. City & County of San Francisco, 818 F.2d 1515 (9th Cir. 1987) 4

Hargett v. National Westminster Bank, USA, 78 F.3d 836 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 84 (1996) 2

Harrison v. Metro Government of Nashville, 80 F.3d 1107 (6th Cir. 1996) 5, 6

Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484, 487-88 (8th Cir. 1998) 4

McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988) 4

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 965 S.Ct. 2574, 49 L.Ed.2d 493 (1976) 1, 2, 4, 6

Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343 (7th Cir. 1997) 4

Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2nd Cir. 1997) 2

Worthy v. United States Steel Co., 616 F.2d 698, 703-04 (3rd Cir. 1980) 3

REASONS FOR DENYING THE PETITION

It is the Petitioner who is confused as to the test to be applied in alleged discriminatory discipline cases. The Fourth Circuit is not in conflict with the other circuits or the United States Supreme Court in applying the "similar in all respects" burden of proof to the Petitioner. The "comparable seriousness" test advanced by the Petitioner should be applied to the misconduct itself and is in addition to the Petitioner's burden to demonstrate that the employees to be compared with herself were "similar in all respects." Furthermore, the Fourth Circuit's emphasis on the fact that different supervisors were involved is not "undue," but entirely appropriate and followed by the other circuits.

The Petitioner cites the United States Supreme Court case of McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 965 S.Ct. 2574, 49 L.Ed.2d 493 (1976), and cases from other circuits to support her position that a less rigid standard of "comparability" has been accepted by the United States Supreme Court and the other circuits in contrast to the "similar in all respects" used by the Fourth Circuit. According to the Petitioner, the "comparability" test is separate, distinct, and in conflict with the "similar in all respects" test.

Incorrectly, the Petitioner takes the term "comparable seriousness" out of the context, which

is the "culpability" and "misconduct" of the employees. McDonald, 427 U.S. 273, 283 n. 11 (1976). Contrary to the Petitioner's assertion that the Fourth Circuit is "at odds" with the other circuits, the cases cited by the Petitioner in fact support the Fourth Circuit's application of the "similar in all respects" standard.

From the Second Circuit, the Petitioner cites Hargett v. National Westminster Bank, USA, 78 F.3d 836 (2nd Cir. 1996), cert. denied, 117 S.Ct. 84 (1996), for the proposition that the Second Circuit is applying the less stringent comparability test than the Fourth Circuit. The Petitioner conveniently ignores the portion of the decision (on the same pages cited by Petitioner) wherein the Second Circuit states:

> As Defendants accurately note, this statement does not imply the determination of whether acts are of "comparable seriousness" requires a myopic examination of the acts alone without regard to the context or surrounding circumstances. Nothing in McDonnell precludes a finding that identical acts undertaken by persons of differing authority or in differing circumstances are not in fact dissimilar.

Hargett at Page 839. See also Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2nd Cir. 1997)

wherein the Sixth Circuit held: "To be 'similarly situated' the individuals with whom Shumway attempts to compare herself must be similarly situated in all materials respects."

Petitioner also cites Worthy v. United States Steel Co., 616 F.2d 698, 703-04 (3rd Cir. 1980), in support of her position. However, the Second Circuit in Worthy did not reject the similarly situated test, but in effect found it "particularly relevant." The Third Circuit held: "Particularly relevant to such a showing would be evidence that white employees with comparable records were not similarly treated." Worthy at 702.

In the Fifth Circuit, the Petitioner relies on Corley v. Jackson Police Department, 566 F.2d 994, 998-99 (5th Cir. 1978). The Fifth Circuit in Corley does not reject the similarly situated test, but references "similarly treated" and uses "comparable" in the context of offenses. See Corley at 999-1000, n. 7.

In the case Friedel v. City of Madison, 832 F.2d 965 (7th Cir. 1987), the focus of the Seventh Circuit was on acts or violations of the plaintiffs. In Friedel, the Court determined that the acts of the plaintiffs were not of "comparable seriousness" to those who were not dismissed because the plaintiffs were involved in more incidences of cheating on exams at the police academy and were in fact the ring leaders. See Friedel at Page 974-975. The Seventh Circuit in Friedel never had to

reach the issue of similarly situated in terms of discipline in that the plaintiffs were not able to show that any female or minority recruits were engaged in nearly identical conduct. In addition, Petitioner ignores the more recent Seventh Circuit decisions, which apply the similarly situated test to the employer's disciplinary actions. See Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343 (7th Cir. 1997), at n. 3, Page 350.

When citing Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484, 487-88 (8th Cir. 1998), the Petitioner totally disregards the Eighth Circuit's holding that the plaintiff "has the burden of proving that he and the disparately treated female nurses were 'similarly situated in all relevant respects.'" Lynn at 487.

In Garrett v. City & County of San Francisco, 818 F.2d 1515 (9th Cir. 1987), the Ninth Circuit merely references McDonald and the "comparable seriousness" of the acts of wrongdoing and does not address the similarly situated issue. Therefore, the Petitioner cannot maintain that the Fourth Circuit is in conflict with the Ninth Circuit.

With regard to McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988), the Petitioner failed to consider the more recent Tenth Circuit case of Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997). In Aramburu, the Tenth Circuit held:

> To assert a claim of disparate treatment, the plaintiff must show that he was treated differently than other similarly situated employees who violated work rules of comparable seriousness.... "Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline."

Aramburu at 1404. (Citations omitted.)

The best analysis of the distinction and interrelationship between "comparable seriousness" and "similarly situated in all respects" is in Harrison v. Metro Government of Nashville, 80 F.3d 1107 (6th Cir. 1996). The Sixth Circuit held:

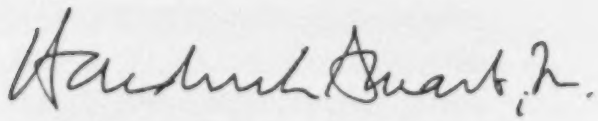
> The Supreme Court has noted that in comparing employment discipline decisions, "precise equivalence in culpability between employees" is not required. . . .Rather, the plaintiff must simply show that the employees were engaged in misconduct of "comparable seriousness." . . .The plaintiff must also demonstrate that the non-minority employees to be compared with himself were "similarly-situated in all respects."

Harrison at 1115. (Citations omitted.)

CONCLUSION

The Fourth Circuit is not in conflict with the Supreme Court or with the other circuits in terms of its application of the similarly situated test and emphasis on the employee's supervisor. It appears that the Petitioner has selectively focused on the term "comparable seriousness" in the McDonald case and cited other cases in the various circuits which in turn relied on McDonald. Petitioner ignored any portions of these cases which reference the similarly situated test and did not search for any subsequent relevant cases in those circuits. In short, the Petitioner's analysis is selective, incomplete and incorrect.

Respectfully submitted,



Hardwick Stuart, Jr.
Berry, Quackenbush & Stuart, PA
Post Office Box 394
Columbia, South Carolina 29202
(803) 779-2650
Attorney for Respondents